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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,) CASE NO. CR.S.09-0136 EJG
12)
Plaintiff,) Supplemental Sentencing Memorandum
13)
v.) DATE: Friday, June 25, 2010
14) TIME: 10:00 a.m.
JOHN JOSEPH MULLIGAN,) COURT: Hon. Edward J. Garcia
15)
Defendant.)
16 _____)

17 The United States of America, by and through the undersigned
18 attorney, respectfully renews the arguments made in its Sentencing
19 Memorandum filed with the Court on September 11, 2009. For the
20 reasons stated with that memorandum, the United States believes that
21 a sentence of 78 months of appropriate in this case. The United
22 States also asks that the victim-impact statements be read in open
23 court as requested by the victim and permitted under the law.

24 I. BACKGROUND

25 On July 10, 2009, the defendant pleaded guilty to Possession of
26 One or More Matters Containing Depictions of Minors Engaged in
27 Sexually Explicit Conduct in violation of 18 U.S.C. § 2252(a)(4)(B).
28

1 C.R. 10. Due to the defendant's desire to respond to inquiries of
2 the Court and to gather and prepare evidence in support of his
3 argument in mitigation to no less than 30 months, sentencing was
4 continued on multiple occasions to June 25, 2010.

5 II. SENTENCING CALCULATION

6 A. Statutory Maximum Sentence

7 The maximum sentence of imprisonment that may be imposed for a
8 violation of 18 U.S.C. § 2252(a)(4)(B) is ten years imprisonment, a
9 fine of \$250,000, and a lifetime period of supervised release. The
10 Court may also order restitution pursuant to 18 U.S.C. § 3663(a)(3).

11 B. Sentencing Guidelines Calculation

12 The Presentence Report calculates the defendant's guideline
13 range at 78-97 months. Report at ¶ 49.

14 C. The Probation Officer's Recommended Sentence

15 The Probation Officer recommends a downward variance to a
16 sentence of 54 months. Id. at ¶ 59. The Probation Officer also
17 recommends an eight-year period of supervised release. Id. at ¶ 60.

18 D. The Defendant's Requested Sentence

19 On June 22, 2010, the defendant filed a sentencing memorandum
20 arguing for a sentence of 30 months. In the alternative, the
21 defendant argued in support of the Probation Officer's recommended
22 sentence of 54 months. C.R. 33.

23 III. GOVERNMENT'S SENTENCING RECOMMENDATION

24 A. A 78-Month Sentence is Appropriate in this Case

25 For the reasons stated in its Sentencing Memorandum filed on
26 September 11, 2009, the government believes that a 78-month sentence
27 is appropriate in this case and meets the stated goals of 18 U.S.C. §
28

1 3553(a). A 78-month sentence recognizes the nature and circumstances
2 of the defendant's conduct and is sufficient, but not greater than
3 necessary, to punish the defendant for that conduct.

4 Such a sentence is not "too high." Def.'s Sent. Mem. at 3:12.
5 Indeed, the defendant's argument for a below-guideline sentence is
6 premised in part on the notion that such sentences are common within
7 the Eastern District. This is not accurate.

8 Of the 19 cases spanning four years that are listed in the
9 defendant's sentencing memorandum, nearly half (nine) were sentenced
10 by Judge Lawrence K. Karlton. The remaining 10 cases were split
11 relatively evenly between the remaining Eastern District judges, with
12 the exception that there are no examples of below-guideline sentences
13 from Judge Morrison C. England. Of those 10 cases, the average
14 departure is 26 months, with none of them departing more than 49
15 percent below the bottom of the guideline range (United States v.
16 Russell, 2:06-340 DFL). The defendant's requested sentence is more
17 than 70 percent below the bottom of the guideline range.

18 The defendant also fails to cite the myriad cases since 2004 in
19 which the courts in this district have imposed guideline range
20 sentences. Nationally, in 2007, 2008, and 2009, only 27, 35, and 37
21 percent of all child exploitation defendants were sentenced to non-
22 government sponsored¹, below-guideline sentences, respectively.²

23
24 ¹ Non-government sponsored includes downward departures under the
25 guidelines and variances pursuant to 18 U.S.C. § 3553(a). Government
26 sponsored departures include government recommendations for a
departure or variance as well as reductions under U.S.S.G. § 5K

27 ² In contrast, non-government sponsored below guideline sentences
28 in 2007 and 2008 were given in 88 and 86 percent of non-child
exploitation cases, respectively. These statistics include child

1 United States Sentencing Commission ("U.S.S.G."), 2007 Sourcebook of
2 Federal Sentencing Statistics, Table 28; U.S.S.G., 2008 Sourcebook of
3 Federal Sentencing Statistics, Table 28; U.S.S.G., 2009 Sourcebook of
4 Federal Sentencing Statistics, Table 27. In light of these facts,
5 the government's recommended sentence of 78-months imprisonment is an
6 appropriate balance between the harm caused by the defendant's
7 actions, the history and characteristics of this defendant, and the
8 need to deter future criminal behavior in this defendant and others.

9 B. Victim-impact Statements Should Be Read in Open Court

10 Victim-impact statements from victims of the defendant's
11 criminal activity have been provided to the government. Pursuant to
12 the victims' requests, the government seeks the opportunity to read
13 three of those statements from victims of the "Vicky" series of
14 images at sentencing. Such reading by an Assistant United States
15 Attorney on behalf of a victim is permitted under the Crime Victim
16 Rights Act (CVRA) and has been allowed by courts within the district.
17 See 18 U.S.C. § 3771(a)(4) and (d)(1); see United States v. Godley,
18 2:08-CR-00557 EJG; United States v. Sanwal, 2:08-CR-00330 EJG.

19 Children depicted in images possessed by the defendant are
20 victims of the defendant's crime. See New York v. Ferber, 458 U.S.
21 747, 759 (1982)("The use of children as subjects of pornographic
22 materials is harmful to the psychological, emotional, and mental
23 health of a child."); see also United States v. Boos, 127 F.3d 1207,
24 1210 (9th Cir. 1997)(holding that children who participate in the
25 production of child pornography are victims); Adam Walsh Child Safety
26 and Protection Act of 2006, Pub. L. No. 109-248, §501, 120 Stat. 587,
27 _____
28 pornography and child prostitution cases.

1 623 (2006)("The illegal production, transportation, distribution,
2 receipt, advertising[, and possession of child pornography ... is
3 harmful to the physiological, emotional, and mental health of the
4 children depicted in child pornography and has a substantial and
5 detrimental effect on society as a whole.") As such, the Court is
6 obligated to ensure that all victims are afforded to opportunity to
7 be heard at any public proceeding, including sentencing. 18 U.S.C. §
8 3771(b)(1), (a)(4).

9 The government also requests the opportunity to read statements
10 from the victim's mother and step-father. The CVRA defines a victim
11 as anyone "directly or proximately harmed by the defendant's
12 conduct." Id. at (e). The parents of a victimized minor certainly
13 meet this standard. Furthermore, the CVRA expressly permits the
14 legal guardians of a minor to assume the minor's rights under the
15 act. As the minor is permitted to be heard in court, so too are her
16 legal guardians. See *United States v. Goodwin*, 287 Fed.Appx. 608
17 (9th Cir. 2008)(unpublished) (permitting victim-impact statements
18 from the child depicted in the images possessed by the defendant and
19 her mother); see also *United States v. Clark*, 335 Fed. Appx. 181,
20 183-84 (3rd Cir. 2009)(unpublished)(permitting the reading of
21 victim-impact statements by a minors and their parents); see also
22 *United States v. McElroy*, 2009 WL 3807157 (unpublished).

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1 IV. CONCLUSION

2 The government respectfully asks the Court to sentence the
3 defendant to 78-months in prison. In addition, the United States
4 asks that three of the victim-impact statements from this case be read
5 in open court.

6 DATED: June 23, 2010

BENJAMIN B. WAGNER
United States Attorney

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9 By: /s/ Kyle Reardon
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Assistant U.S. Attorney
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